11 U.S.C. 1307(b)
11 U.S.C. 1307(c)
dismissal
conversion

CUMIS Mutual Insurance Society v. Byers et. al (In Re Byers)
B.A.P. # OR-97-1879-JDMe
Main Case # 696-65664-aer13

5/12/98 B.A.P. (aff'g Radcliffe) Unpublished*

After a Chapter 13 plan had been confirmed, completed, discharge entered and the case closed, the case was reopened on a creditor's motion. Creditor sought various forms of relief, including conversion to Ch. 7.

Debtors filed a motion to dismiss and agreed to have their discharge vacated. While the creditor's request for conversion was pending, the Bankruptcy Court vacated the discharge, granted debtors' motion and dismissed the case,

On appeal, the 9th Circuit Bankruptcy Appellate Panel (BAP) affirmed, holding that the right of a Chapter 13 debtor to dismiss under § 1307(b) is absolute (even in the face of a motion to convert) provided the case had not converted previously into Chapter 13 under §§ 706, 1112, or 1208. That the case had been reopened after closure was immaterial.

The BAP noted in dicta that a Ch. 13 debtor may be sanctioned for bad faith acts in conjunction with a motion to dismiss.

*On occasion the court will decide to publish an opinion after its initial entry (and after submission of this summary). Please check for possible publication in WESTLAW, West's Bankruptcy Reporter, etc.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re DONALD A. BYERS; CATHLEEN J. BYERS, Debtors.	BAP No. OR-97-1879-JDMe BK No. 96-65664-aer13
CUMIS MUTUAL INSURANCE SOCIETY, INC. Appellant, v. DONALD A. BYERS; CATHLEEN J. BYERS; FRED LONG, Trustee; UNITED STATES TRUSTEE, Appellees.	**M E M O R A N D U M**[1]

Argued and Submitted on March 19, 1998
at Portland, Oregon

Filed - May 12, 1998

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: JONES, DONOVAN[2], AND MEYERS, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

[2] Hon. Thomas B. Donovan, Bankruptcy Judge for the Central District of California, sitting by designation.

E98-5(12)

Creditor appeals from the bankruptcy court's order vacating the Debtors' discharge and dismissing the Debtors' chapter 13[3] case. The creditor claims the bankruptcy court erred in dismissing the case when the creditor's motion to convert the case to a chapter 7 proceeding was pending. We **AFFIRM.**

I. FACTS

Pre-petition, Cathleen Byers had been employed with Oregon Urban Rural Credit Union ("OUR"). While in her capacity as General Manager of OUR, Mrs. Byers embezzled money from her employer. On March 16, 1995, a grand jury for the United States District Court for the District of Oregon issued an eighty-four count indictment against Mrs. Byers. While the criminal case was pending, Mrs. Byers was free on her own recognizance. Due to Mrs. Byers embezzlement, Appellant CUMIS Mutual Insurance Society, Inc. ("CUMIS") paid OUR $537,077.10 pursuant to an "employee dishonesty" insurance policy.

Donald Byers and Cathleen Byers (collectively referred to as the "Debtors") filed for chapter 13 bankruptcy protection on November 6, 1996. Although the charges against Mrs. Byers were still pending, the Debtors did not list OUR or CUMIS on their schedules. The Debtors filed a plan which provided 100% payment to the listed creditors. The bankruptcy court confirmed the plan

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[3] Unless otherwise indicated, all references to Chapters, Sections, and Rules are to the Bankruptcy Code, 11 U.S.C. §§ 101 et. seq., and to the Federal Rules of Bankruptcy Procedure, Rules 1001, et seq.

on January 23, 1997.

On March 19, 1997, following a jury trial in the criminal case, Mrs. Byers was found guilty of embezzlement from OUR. Prior to the sentencing hearing, at some point in April of 1997, the Debtors sold their house and used the proceeds from the sale to fully fund their chapter 13 plan. The chapter 13 Trustee disbursed the proceeds, paying all listed creditors 100% of their claims. On May 12, 1997, the bankruptcy court entered an order discharging the Debtors.

CUMIS claims it discovered the existence of the bankruptcy case on June 5, 1997. Notwithstanding discovering the bankruptcy case, CUMIS never appeared or objected to the closing of the bankruptcy case. Consequently on July 10, 1997, the bankruptcy court entered an order closing the case.

On July 18, 1997, CUMIS filed a motion to reopen the bankruptcy case and concurrently filed an adversary action against the Debtors which requested: (1) revocation of the Debtors' discharge; (2) revocation of the confirmed plan; and (3) conversion of the case to a chapter 7 proceeding. The bankruptcy court granted the motion to reopen the case on August 12, 1997.

On August 28, 1998, the Debtors filed a motion to dismiss the case pursuant to § 1307(b). The Debtors sent notice of the motion to dismiss to the chapter 13 Trustee and the U.S. Trustee's office. CUMIS alleges it never received notice of the motion to dismiss.

Also on August 28, 1998, CUMIS filed a motion for default

judgment contending that the Debtors had failed to answer the adversary complaint CUMIS had filed concurrently with the motion to reopen the case.

On September 9, 1997, the bankruptcy court mailed a notice of the hearing on the Debtors' motion to dismiss to CUMIS. The hearing was set for October 2, 1997. CUMIS did not file a written objection to the Debtors' motion to dismiss.[4] Richard A. Sly represented CUMIS at the hearing on the motion to dismiss. At that hearing the bankruptcy court conducted an off-the-record conference with counsel for the trustee, Debtors and CUMIS. At the conclusion of the conference, and back on the record, the Debtors consented to the revocation of their discharge and a dismissal of their case. Counsel for CUMIS made no objection on the record. The bankruptcy court then orally vacated the Debtors' discharge and granted the Debtors' motion to dismiss.

On October 7, 1997, CUMIS filed an "Amended Objections to Dismissal Motion, Motion to Alter and Reconsider, and Motion for New Hearing." CUMIS alleged that the Debtors' motion to dismiss was never served on CUMIS. CUMIS further alleged that the only effective means to recover the Debtors' assets for redistribution was through the bankruptcy court.

On October 10, 1997, the bankruptcy court entered a written order vacating the Debtors' discharge and dismissing the

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[4] Notwithstanding the bankruptcy court sending CUMIS a notice of a hearing on Debtors' motion to dismiss on September 9, 1997, CUMIS claims it obtained a copy of the Debtors' motion to dismiss on September 29, 1997, only three days before the hearing on Debtors' motion.

Debtors' chapter 13 case. The bankruptcy court's conclusions of law recited that the "Debtors were not required to serve CUMIS with their motion. FRBP 1017(d); FRBP 9013." The bankruptcy court also found that "CUMIS, through counsel, received adequate notice of the October 2, 1997, hearing." Further, the bankruptcy court concluded CUMIS' motion to convert was erroneously brought in "'Count III' of the adversary proceeding, instead of by motion. FRBP 1017(d)." The bankruptcy court concluded that the Debtors had a right to dismiss their bankruptcy petition. Consequently the bankruptcy court overruled CUMIS' Amended Objections and dismissed the Debtors' chapter 13 case. The bankruptcy court also dismissed the adversary proceeding filed by CUMIS as moot.

CUMIS timely appeals.

II. ISSUE

Whether the bankruptcy court erred in dismissing the Debtors' chapter 13 proceeding while CUMIS had a pending motion to convert the case to a chapter 7 proceeding.

III. STANDARD OF REVIEW

We review the bankruptcy court's conclusions of law de novo. In re Jess, 215 B.R. 618, 619 (9th Cir. BAP 1997).

IV. DISCUSSION

The bankruptcy court below concluded that the Debtors

have a right to dismissal pursuant to § 1307(b). That section provides in pertinent part: "On request of the debtor at any time, if the case has not been converted under section 706, 1112 or 1208 of this title, the court shall dismiss a case under this chapter." 11 U.S.C. § 1307(b). As the Debtors' case had not yet been converted pursuant to the Appellant's "motion",[5] the bankruptcy court concluded that the Debtors were entitled to dismiss their voluntary chapter 13 case.

The Appellant urges on appeal that § 1307(b) is tempered by § 1307(c) which provides that:

> on request of a party in interest or the United States trustee and after notice and a hearing, a court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause. . . .

11 U.S.C. § 1307(c). Appellant argues that their pending motion to convert this case to a chapter 7 proceeding was "for cause" and therefore the bankruptcy court erred in granting the Debtors' motion to dismiss.

Whether § 1307(c) indeed modifies the language in § 1307(b) is a question of law this panel reviews de novo. Jess, 215 B.R. at 619. In reviewing the case law on the question, we find that there is a split of authority on this issue.

In In re Harper-Elder, 184 B.R. 403, 404 (Bankr. D.C.

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[5] There remains a procedural question as to whether "Count III" in Appellant's adversary complaint constitutes a proper motion for conversion. However, because we hold that the bankruptcy court properly applied § 1307(b) in dismissing the Debtors' bankruptcy petition, we need not reach this question.

1995), the bankruptcy court for the District of Columbia analyzed numerous cases detailing this split of authority. The court noted that "Some courts have held that the debtor's right to dismiss is an absolute right and that the court has no discretion to consider the creditor's pending motion to convert under § 1307(c) when faced with the debtor's motion to dismiss under § 1307(b)." Id. (citations omitted). The bankruptcy court then quotes from this Panel's holding in In re Beatty, 162 B.R. 853, 857 (9th Cir. BAP 1994) wherein we stated that "[t]his view comports with the plain language of section 1307[b] which states that the court 'shall' dismiss the case upon the debtor's request as well as the purposes of Chapter 13 and the voluntary nature of the relief under that Chapter."

The Harper-Elder court also notes that other courts "have held that they do have the discretionary authority to grant a pending motion to convert a chapter 13 case in the face of a debtor's competing request for dismissal, particularly where there is evidence of improper conduct by the debtor." Harper-Elder, 184 B.R. at 404 (citations omitted). These courts reason that "Congress could not have intended to 'give the debtor unfettered power to prevent conversion under § 1307(c) by simply filing a motion to dismiss whenever conversion was requested.'" Id. quoting In re Gaudet, 132 B.R. 670, 676 (D. R.I. 1991).

We conclude that on the facts of this case, the bankruptcy court did not err in dismissing the Debtors' case.

The language of the statute.

The interpretation of a statutory provision begins with "the language of the statute itself." Pennsylvania Public Welfare Dep't v. Davenport, 495 U.S. 552, 558 (1990)(citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). If the statutory language is unambiguous, the court does not need to inquire further. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

The language of § 1307(b) provides that the court "shall" dismiss a debtor's chapter 13 case upon the debtor's request. The word "shall" has traditionally been held to be a "word of command" In re Benediktsson, 34 B.R. 349, 350 (Bankr. W.D. Wash. 1983)(citing, U.S. ex rel. Siegel v. Thoman, 156 U.S. 353 (1895)), which "allows the trial court no discretion." In re Green, 64 B.R. 530, 531 (9th Cir. BAP 1986)(citing, Matter of Hearn, 18 B.R. 605, 606 (D. Neb. 1982).

The only limitation on a debtor's right of dismissal is that dismissal will be granted "if the case has not been converted under section 706, 1112, or 1208 of this title." 11 U.S.C. § 1307(b). In the present case, the Appellant does not dispute that the Debtors' case had not been converted prior to the Debtors' motion to dismiss. As the Debtors' case had not been converted, the bankruptcy court did not err in dismissing the Debtor's case.

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The Legislative History of § 1307(b).

The legislative history of § 1307(b) also supports the bankruptcy court's dismissal of the Debtor's case. The House of Representatives Report on § 1307(b) notes that: "Subsection (b) [of § 1307] requires the court, on request of the debtor, to dismiss the case if the case has not already been converted from chapter 7 or 11." H.Rep. 95-595, 95th Cong., 1st Sess. 428 (1977), reprinted in Norton Bankruptcy Law and Practice 2d, William L. Norton, Jr., ed., 1996-97 edition. (Emphasis added.) The Senate agreed with this reasoning stating: "Subsections (a) and (b) confirm, without qualification, the rights of the Chapter 13 debtor to . . . have the chapter 13 case dismissed." S.Rep. 95-989, 95th Cong., 1st Sess. 428 (1977), reprinted in Norton Bankruptcy Law and Practice 2d, William L. Norton, Jr., ed., 1996-97 edition. (Emphasis added.) This legislative history demonstrates that the drafters of § 1307(b) intended that a debtor in a voluntary chapter 13 case may dismiss the case, as long as the case had not already been converted.

Case law in this circuit supports the bankruptcy court.

Finally, a review of the case law in this circuit reveals that, without discovered exception, the courts in the Ninth Circuit have uniformly held that debtors may dismiss their chapter 13 petitions.

In In re Nash, 765 F.2d 1410 (9th Cir. 1985), the Ninth Circuit was asked to determine whether wages which had been

deducted from the debtor's paycheck after the debtor's chapter 13 case had been dismissed were properly distributed by the chapter 13 trustee. As a preliminary step the Ninth Circuit noted that the case had been properly dismissed because under § 1307(b) "a debtor has an absolute right to dismiss." Id. at 1413. See also, In re Anderson, 21 F.3d 355, 358 n.8 (9th Cir. 1994)(noting in dicta that "[b]ecause bankruptcy under chapter 13 is voluntary, the [debtor] would always have the option of terminating the plan . . .").

This Panel has also adhered to the plain meaning of § 1307(b) in holding that the debtor may dismiss a chapter 13 proceeding. In Beatty, 162 B.R. at 857, this Panel was confronted with the question of whether a debtor's motion to dismiss which was made after a bankruptcy court's oral ruling converting the case to a chapter 7 proceeding, mandated dismissal of the case. This panel held that because § 1307(b) mandates dismissal "at any time" before conversion, and because conversion is only effective upon the entry of a written order, the debtor's motion to dismiss pursuant to § 1307(b) mandated dismissal of the chapter 13 petition. Id. at 858. See also, In re Green, 64 B.R. 530, 531 (9th Cir. BAP 1986)(noting in dicta that § 1307(b) "gives the debtor an absolute right to dismiss").

Finally, bankruptcy courts in California, Oregon and Washington have all issued opinions noting that the court may dismiss the debtor's voluntary petition upon the debtor's motion. In re Turiace, 41 B.R. 466, 466 (Bankr. Or. 1984); In re

Benediktsson, 34 B.R. 349, 350 (Bankr. W.D. Wash. 1983); In re Davenport, 175 B.R. 355, 360 (Bankr. E.D. Cal. 1994)(holding that the debtor has an absolute right to dismissal of a chapter 12 proceeding under § 1208(b) which is nearly identical to § 1307(b)).

The foregoing authority demonstrates that courts in the Ninth Circuit have consistently held that debtors may dismiss their chapter 13 petitions. Nevertheless, the Appellant attempts to distinguish the foregoing cases by noting that in this particular case the chapter 13 case had already been closed. The Appellant seems to argue that since the case had already been closed, the subsequent reopening of the bankruptcy case by the Appellant fundamentally alters the nature of the chapter 13 proceeding thereby eviscerating the Debtors' right to dismiss their chapter 13 case. However, this Panel is unable to accept Appellant's attempts to distinguish the foregoing cases. Each of the foregoing cases, although not having identical facts to the ones presented here, note that a debtor has the right to dismiss the chapter 13 petition. While a debtor may be sanctioned by the bankruptcy court for bad faith acts in conjunction with the motion to dismiss, Davenport, 175 B.R. at 361, the result in each of the foregoing cases is that the debtor's case must still be dismissed. Consequently, the Appellant's attempt to distinguish the prevailing Ninth Circuit authority is unavailing.

We also note that the Debtors' dismissal does not preclude the Appellant from seeking state court remedies against

the Debtors. In fact by dismissing their case the Debtors indicate that they are "prepared to limit [their] rights and remedies to those available in state court." Hearn, 18 B.R. at 606. Consequently the Appellant is still free to pursue any state law remedy it has against the Debtors.

V. CONCLUSION

In light of the mandatory language of § 1307(b), as well as that section's legislative history and relevant case law from this circuit, the bankruptcy court properly dismissed the Debtors' chapter 13 petition upon the Debtors' request. We **AFFIRM**.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit Court of Appeals
125 South Grand Avenue
Pasadena, California 91105
(626) 583-7906

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-97-1879-JDMe

RE: DONALD A. BYERS adn CATHLEEN J. BYERS

A separate Judgment was entered in this case on _____5/12/98_____.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.